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DKLS SUNSHINE SDN BHD v. KERAJAAN NEGERI PULAU PINANG & ANOR

COURT OF APPEAL, PUTRAJAYA
UMI KALTHUM ABDUL MAJID JCA
AHMADI ASNAWI JCA
B RHODZARIAH BUJANG JCA
[CIVIL APPEAL NO: P-01(A)-162-05-2017]
16 JANUARY 2019

C ***ADMINISTRATIVE LAW:*** *Judicial review – Application for – Objection against award of compensation for acquisition of land – Filing of ex parte application for judicial review to quash order of compensation – Subsequent application for leave for judicial review to quash acquisition of land – Whether judicial review in respect of acquisition of land or against quantum of compensation – Whether application filed out of time – Whether delay inordinate – Whether reasons provided for delay*
D *– Whether there was application for extension of time – Whether application ought to be dismissed – Rules of Court 2012, O. 53 r. 3(2), 3(6)*

LAND LAW: *Acquisition of land – Objection against compensation – Filing of ex parte application for judicial review to quash order of compensation – Subsequent application for leave for judicial review to quash acquisition of land – Whether*
E *judicial review in respect of acquisition of land or against quantum of compensation – Whether application filed out of time – Whether delay inordinate – Whether reasons provided for delay – Whether there was application for extension of time – Whether application ought to be dismissed – Rules of Court 2012, O. 53 r. 3(2), 3(6)*

F The appellant was the registered proprietor of the lands ('scheduled land') acquired by the first respondent under s. 8(1) of the Land Acquisition Act 1960 ('LAA'), pursuant to a declaration in Form D and subsequently gazetted *vide* Warta Kerajaan Negeri Pulau Pinang N 255 dated 17 April 2014. Public notice of the said acquisition in Form E of the LAA was issued pursuant to s. 10(1) and served on the appellant on 26 November 2014.
G A full enquiry into the value of the scheduled land was conducted by the second respondent in the presence of the appellant on 17 December 2014, 3 November 2015, 10 March 2016, 11 April 2016 and 14 April 2016 and a total compensation sum of RM32,888,013.89, was deposited in court pursuant to s. 29 of the LAA on account of the appellant's refusal to accept
H the said compensation sum. Aggrieved by the said decision, the appellant lodged Form N pursuant to s. 38(1) of the LAA with the Land Administrator, protesting over the sufficiency of the compensation sum. Subsequently, a notice of award and offer of compensation in Form H was issued and duly served on the appellant on 6 June 2016. In spite of the
I lodgement of Form N, on 4 July 2016, the appellant had also proceeded to file an *ex parte* application for judicial review seeking to quash the order made

by the second respondent on 14 April 2016. Leave was granted to the appellant for the application for judicial review and the sealed order was served on both the respondents on 11 November 2016. However, before service of the sealed order, the appellant had, on 13 September 2016, filed the 'Notis Pendengaran Permohonan Bagi Semakan Kehakiman di bawah Aturan 53 Kaedah 4, Kaedah-Kaedah Mahkamah 2012', seeking substantive relief, amongst others, an order of *certiorari* to quash the acquisition of the scheduled land. The respondents served a notice of preliminary objection upon the appellant, contending that the judicial review, in essence, was in respect of the acquisition of the scheduled land by the first respondent under s. 8(1) of the LAA. It was argued by the respondents that Form E, notifying the appellant, as the land owner, of the said acquisition was served on the appellant on 26 November 2014. The respondents argued that the application for judicial review to challenge the decision of the first respondent must be filed within three months from the service of Form E on the appellant, in conformity with O. 53 r. 3(6) of the Rules of Court 2012 ('ROC'). Hence, the filing of the *ex parte* application for judicial review was clearly in violation of O. 53 r. 3(6) of the ROC. The Judicial Commissioner ('JC') sustained the respondents' preliminary objection and hence, the appellant appealed. The issues for determination herein were whether the judicial review was in respect of the acquisition of the scheduled land under s. 8(1) of the LAA where the same was gazetted on 17 April 2014 and where the notification in Form E of the said acquisition was duly served upon the appellant on 26 November 2014 or whether it was a judicial review in connection with the order/decision made by the second respondent upon conclusion of the enquiry on 14 April 2016.

Held (dismissing appeal with costs)
Per Ahmadi Asnawi JCA delivering the judgment of the court:

(1) The prayers in para. 3(a) in the statement pursuant to O. 53 r. 3(2) of the ROC and para. 3(ii)(a) of the statement supporting the appellant's application under O. 53 r. 4 of the ROC ('paras. 3(a) and 3(ii)(a)') were about the quashing of the decision made by the State Authority to acquire the scheduled land *vide* the declaration in Form D, which was published in the State Government *Gazette* on 17 April 2014 pursuant to s. 8(1) of the LAA. The prayers were inconsistent with prayer (a) of the *ex parte* application. The appellant's argument that the judicial review was against the second respondent's decision on 14 April 2014 was contradicted by the appellant's own statement of facts and hence, was untenable and neither was it defensible. The prayers also could not have been a mere clerical error on account that the statements were littered with averments in support of the prayers set out in paras. 3(a) and 3(ii)(a), and equally inconsistent with prayer (a) of the *ex parte* application. (paras 30 & 32)

(2) The thrust of the O. 53 r. 3(2) statement was directed towards the impropriety and illegality or otherwise of the acquisition of the scheduled land by the first respondent and not against the order/decision made by the second respondent, which in this case, was strictly limited only on the issue of the quantum of the compensation sum payable to the appellant and other matters incidental to it. Cumulatively, the said corresponding statements were consistent and supportive of the prayers encapsulated in paras. 3(a) and 3(ii)(a) of the statements respectively. The appellant's affidavit in support of the 'Notis Pendengaran Bagi Semakan Kehakiman' was crafted in identical terms and wholly supported the granting of the prayers as set out in paras. 3(a) and 3(ii)(a) of the statements under O. 53 r. 3(2) of the ROC. There was nothing in the affidavit suggesting 'satu perintah *certiorari* bagi membatalkan Perintah Perbicaraan Pengambilan Tanah No. 70/2014.' (paras 35 & 36)

(3) The decision to acquire the scheduled land was purely within the prerogative of the first respondent, being empowered to do so under s. 8(1) of the LAA. The second respondent's role was only to execute the decision made by the first respondent. The second respondent was devoid of any jurisdiction to make an acquisition order. His primary duty is mainly to determine the quantum of compensation that is payable to the person or persons interested in such land. In case the person or persons interested is dissatisfied with the quantum, he or she is at liberty to file an objection *vide* Form N pursuant to s. 38 of the LAA. This course of action had been initiated by the appellant. (paras 37-40)

(4) The appellant's application was directed squarely to quash the decision of the first respondent in acquiring the scheduled land and not to quash the decision of the second respondent on the quantum of compensation due to the appellant made on 14 April 2016. Hence, in conformity with the requirement under O. 53 r. 3(6) of the ROC, the appellant must file his *ex parte* application for leave for judicial review to quash the said decision within three months of the service of Form E upon the appellant, where the decision of the first respondent declaring the formal acquisition of the scheduled land was first communicated to the appellant. (para 41)

(5) Form E was served on the appellant on 26 November 2014. The *ex parte* application for leave for judicial review was only filed on 4 July 2016, slightly more than 19 months after service of Form E was effected upon the appellant. Hence, there was delay beyond three months' time line as stipulated by O. 53 r. 3(6) of the ROC and the delay was wholly inordinate. There was no application for extension of time and neither did the appellant provide reasons for the delay in making the application. The appellant's application was verily out of time. Therefore, the JC had no jurisdiction to hear the judicial review

application and had correctly sustained the respondents' preliminary objection and his consequential order of dismissing the appellant's application *in limine*. (paras 42 & 43)

(6) Order 53 r. 3(2) of the ROC is mandatory in nature and it emphasises the principle that a party is bound by his own pleading. The inconsistencies in respect of the appellant's prayer as pleaded in the *ex parte* application and the prayers as pleaded in the appellant's statement, under O. 53 r. 3(2), and the subsequent averment of facts were poles apart. The prayers pleaded in the *ex parte* application and the submissions advanced were beyond the scope of the appellant's pleaded case as encapsulated in the statement and the appellant's affidavits in support thereof. These two grounds constituted sufficient reasons for the finding that the appeal had no merits. Thus, there was no error in the JC's decision in dismissing the appellant's application *in limine* and therefore, the appeal was dismissed. (para 48)

Bahasa Malaysia *Headnotes*

Perayu adalah pemilik berdaftar tanah-tanah ('tanah berjadual'), yang diperolehi responden pertama bawah s. 8(1) Akta Pengambilan Tanah 1960 ('Akta'), berikutan pengisytiharan dalam Borang D dan kemudian diwartakan dalam *Warta* Kerajaan Negeri Pulau Pinang N 255 bertarikh 17 April 2014. Notis awam pengambilan tersebut dalam Borang E Akta dikeluarkan menurut s. 10(1) dan diserahkan kepada perayu pada 26 November 2014. Satu siasatan penuh untuk nilai tanah berjadual itu dibuat oleh responden kedua dalam kehadiran perayu pada 17 Disember 2014, 3 November 2015, 10 Mac 2016, 11 April 2016 dan 14 April 2016 dan jumlah pampasan sebanyak RM32,888,013.89 didepositkan dalam mahkamah menurut s. 29 Akta kerana perayu enggan menerima jumlah pampasan tersebut. Terkilan dengan keputusan itu, perayu memasukkan Borang N menurut s. 38(1) Akta dengan Pentadbir Tanah, membantah kecukupan jumlah pampasan. Kemudian, satu notis award dan tawaran pampasan dalam Borang H dikeluarkan dan diserahkan sewajarnya kepada perayu pada 6 Jun 2016. Walaupun telah memasukkan Borang N, pada 4 Julai 2016, perayu juga meneruskan dengan pemfailan permohonan *ex parte* untuk semakan kehakiman memohon pembatalan perintah yang dibuat oleh responden kedua pada 14 April 2016. Kebenaran diberikan kepada perayu untuk permohonan semakan kehakiman dan perintah meterai diserahkan kepada kedua-dua responden pada 11 November 2016. Walau bagaimanapun, sebelum penyerahan perintah meterai itu, perayu, pada 13 September 2016, telah memfailkan 'Notis Pendengaran Permohonan Bagi Semakan Kehakiman di bawah A. 53 k. 4, Kaedah-Kaedah Mahkamah 2012' memohon relief substantif, antara lain, satu perintah *certiorari* membatalkan pengambilan tanah berjadual tersebut. Responden-responden memfailkan notis bantahan awalan terhadap perayu, menghujahkan bahawa semakan

kehakiman pada dasarnya, berkaitan dengan pengambilan tanah berjadual oleh responden pertama bawah s. 8(1) Akta. Responden-responden menghujahkan bahawa Borang E, yang memaklumkan perayu, sebagai pemilik tanah, tentang pengambilan tersebut diserahkan kepada perayu pada 26 November 2014. Responden-responden menghujahkan bahawa permohonan semakan kehakiman mencabar keputusan responden pertama mesti difailkan dalam tempoh tiga bulan dari tarikh penyerahan Borang E kepada perayu, mematuhi A. 53 k. 3(6) Kaedah-kaedah Mahkamah 2012 ('KKM'). Oleh itu, pemfailan permohonan *ex parte* untuk semakan kehakiman jelas bercanggah dengan A. 53 k. 3(6) KKM. Pesuruhjaya Kehakiman ('PK') mengekalkan bantahan awalan responden-responden dan dengan itu, perayu merayu. Isu untuk pertimbangan di sini adalah sama ada semakan kehakiman berkaitan dengan pengambilan tanah berjadual bawah s. 8(1) Akta yang digazetkan pada 17 April 2014 dan pemberitahuan dalam Borang E untuk pengambilan tersebut diserahkan kepada perayu pada 26 November 2014 atau sama ada semakan kehakiman tersebut berkaitan dengan perintah/keputusan responden kedua pada pengakhiran siasatan pada 14 April 2016.

Diputuskan (menolak rayuan dengan kos)
Oleh Ahmadi Asnawi HMR menyampaikan penghakiman mahkamah:

(1) Permohonan dalam perenggan 3(a) pernyataan menurut A. 53 k. 3(2) KKM dan perenggan 3(ii)(a) pernyataan menyokong permohonan perayu bawah A. 53 k. 4 KKM ('perenggan 3(a) dan 3(ii)(a)') adalah mengenai pembatalan keputusan Pihak Berkuasa Negeri untuk pengambilan tanah berjadual melalui pengisytiharan dalam Borang D, yang diterbitkan dalam *Warta* Kerajaan Negeri pada 17 April 2014 menurut s. 18(1) Akta. Permohonan-permohonan tersebut tidak konsisten dengan permohonan (a) permohonan *ex parte*. Hujahan perayu bahawa semakan kehakiman adalah terhadap keputusan responden kedua pada 14 April 2014 bercanggah dengan pernyataan fakta perayu sendiri dan dengan itu, tidak boleh dikekalkan dan juga tidak boleh dipertahankan. Permohonan itu juga tidak mungkin kesilapan perkeranian semata-mata kerana pernyataan-pernyataan tersebut penuh dengan kenyataan menyokong permohonan yang dikemukakan dalam perenggan 3(a) dan 3(ii)(a), dan juga tidak konsisten dengan permohonan (a) permohonan *ex parte*.

(2) Asas pernyataan A. 53 k. 3(2) diarahkan terhadap pengambilan tanah berjadual dengan cara tidak wajar dan tidak sah atau sebaliknya oleh responden pertama dan bukan terhadap perintah/keputusan responden kedua, yang dalam kes ini, secara ketat terhad hanya terhadap isu kuantum jumlah pampasan yang perlu dibayar kepada perayu dan perkara-perkara lain yang berkait dengannya. Secara kumulatifnya, pernyataan-pernyataan sepadan itu konsisten dan menyokong permohonan-permohonan yang terkandung dalam perenggan 3(a) dan

3(ii)(a) pernyataan-pernyataan tersebut. Afidavit perayu menyokong 'Notis Pendengaran Bagi Semakan Kehakiman' dikarang dalam terma yang serupa and keseluruhannya menyokong pemberian permohonan-permohonan yang dikemukakan dalam perenggan 3(a) dan 3(ii)(a) kenyataan-kenyataan bawah A. 53 k. 3(2) KKM. Tiada apa-apa dalam afidavit tersebut yang mencadangkan 'satu perintah *certiorari* bagi membatalkan Perintah Perbicaraan Pengambilan Tanah No. 70/2014.'

(3) Keputusan untuk mengambil tanah berjadual itu adalah dalam prerogatif responden pertama, diberi kuasa berbuat demikian bawah s. 8(1) Akta. Peranan responden kedua hanya untuk melaksanakan keputusan yang dibuat oleh responden pertama. Responden kedua tiada bidang kuasa untuk memberi perintah pengambilan. Tanggungjawab utamanya adalah khusus untuk menentukan kuantum pampasan yang perlu dibayar kepada individu atau individu-individu yang berminat dalam tanah itu. Jika seseorang individu atau individu-individu yang berminat tidak berpuas hati dengan kuantum tersebut, dia bebas memfailkan bantahan dalam Borang N menurut s. 38 Akta. Tindakan ini telah pun dimulakan oleh perayu.

(4) Permohonan perayu diarahkan dengan tepat untuk membatalkan keputusan responden pertama dalam pengambilan tanah berjadual dan bukan untuk membatalkan keputusan responden kedua berkaitan kuantum pampasan yang perlu diberi kepada perayu yang dibuat pada 14 April 2016. Oleh itu, dalam pematuhan keperluan A. 53 k. 3(6) KKM, perayu mesti memfailkan permohonan *ex parte* untuk kebenaran semakan kehakiman untuk membatalkan keputusan tersebut dalam tempoh tiga bulan selepas penyerahan Borang E kepada perayu, dan keputusan responden pertama mengisytiharkan pengambilalihan formal tanah berjadual pertama kali dimaklumkan pada perayu.

(5) Borang E diserahkan kepada perayu pada 26 November 2014. Permohonan *ex parte* untuk kebenaran untuk semakan kehakiman hanya difailkan pada 4 Julai 2016, lebih daripada 19 bulan selepas penyerahan Borang E kepada perayu. Oleh itu, terdapat kelewatan melampaui tempoh tiga bulan yang diperuntukkan oleh A. 53 k. 3(6) KKM dan kelewatan tersebut jelas tidak munasabah. Tiada permohonan untuk lanjutan masa dan perayu juga tidak memberikan sebab untuk kelewatan membuat permohonan tersebut. Permohonan perayu jelas di luar masa. Oleh itu, PK tiada bidang kuasa untuk mendengar permohonan semakan kehakiman dan telah, dengan betul, mengekalkan bantahan awalan responden-responden, dan perintah berikutannya, menolak permohonan perayu *in limine*.

(6) Aturan 53 k. 3(2) KKM bersifat mandatori dan ia menekankan prinsip bahawa satu-satu pihak terikat dengan plidingnya sendiri. Ketidakkonsistenan dalam permohonan perayu seperti yang dirayu

dalam permohonan *ex parte* dan permohonan-permohonan yang diplid dalam pernyataan perayu, bawah A. 53 k. 3(2), dan pernyataan fakta yang kemudiannya, jelas berbeza. Permohonan yang diplid dalam permohonan *ex parte* dan hujahan-hujahan yang dikemukakan melampaui skop kes perayu yang diplid seperti yang terkandung dalam pernyataan dan afidavit-afidavit sokongan perayu. Kedua-dua alasan ini membentuk alasan yang mencukupi untuk membuat dapatan bahawa rayuan tidak bermerit. Oleh itu, tiada kekhilafan dalam keputusan PK menolak permohonan perayu *in limine* dan oleh itu, rayuan ditolak.

Case(s) referred to:

Jitender Singh Pagar Singh & Ors v. Pentadbir Tanah Wilayah Persekutuan & Another Appeal [2012] 2 CLJ 165 CA ***(refd)***

Kijal Resort Sdn Bhd v. Pentadbir Tanah Kemaman & Anor [2015] 3 CLJ 861 FC ***(refd)***

Tuan Hj Sarip Hamid & Anor v. Patco Malaysia Sdn Bhd [1995] 3 CLJ 627 SC ***(refd)***

Tunku Yaacub Holdings Sdn Bhd v. Pentadbir Tanah Kedah & Ors [2015] 3 CLJ 1017 FC ***(refd)***

V Paul Raj Chelladurai v. Jabatan Telekom Malaysia Bhd & Ors [2000] 4 CLJ 882 CA ***(refd)***

Wong Kin Hoong & Anor v. Ketua Pengarah Jabatan Alam Sekitar & Anor [2013] 4 CLJ 193 FC ***(refd)***

Legislation referred to:

Land Acquisition Act 1960, ss. 3(1)(a), (c), (3), (5), 3A, 3B, 3C, 3D, 3E, 8(1), 10(1), 12(1), 14, 16, 29, 38(1)

Rules of Court 2012, O. 42 r. 13, O. 53 rr. 3(2), (6), 4

Rules of the High Court 1980, O. 53 r. 3(6)

For the appellant - Ngeh Koo Ham & Kartini Mansor; M/s Ngeh & Co

For the respondent - Anas Ahmad Zakie & Siti Fatimah Talib; State Legal Advisors, Pulau Pinang

[Editor's note: For the High Court judgment, please see DKLS Sunshine Sdn Bhd v. Kerajaan Negeri Pulau Pinang & Anor [2017] 7 CLJ 602 (affirmed).]

Reported by S Barathi

JUDGMENT

Ahmadi Asnawi JCA:

[1] This is the appellant's appeal in respect of the decision of the learned Judicial Commissioner ('JC') delivered on 20 April 2017, who had sustained the respondents' preliminary objection ('PO') that the judicial review herein was filed by the appellant beyond the time prescribed under O. 53 r. 3(6) of the Rules of Court 2012 ('ROC').

The Facts In Brief

[2] The appellant was the registered proprietor of the following lands ('scheduled land'):

(i) Lot no 1384 GM 486, Mukim 11, Daerah Seberang Perai Selatan (4575.4698 sqm in area);

(ii) Lot no 1385 GRN 38712, Mukim 11, Daerah Seberang Perai Selatan (142271.2695 sqm in area); and

(iii) Lot no 1887 GRN 39320 Mukim 11, Daerah Seberang Perai Selatan (313125.483 sqm in area).

[3] The scheduled land was acquired by the first respondent under s. 8(1) of the Land Acquisition Act 1960 ('LAA'), pursuant to a declaration in Form D of the same Act and subsequently gazetted *vide Warta* Kerajaan Negeri Pulau Pinang N 255 dated 17 April 2014.

[4] Public notice of the said acquisition in Form E of the LAA was issued pursuant to s. 10(1) of the same and served on the appellant/landowner on 26 November 2014.

[5] A full enquiry into the value of the scheduled land was conducted pursuant to s. 12(1) of the LAA by the second respondent in the presence of the appellant on 17 December 2014, 3 November 2015, 10 March 2016, 11 April 2016 and 14 April 2016.

[6] Having considered the appellant's valuation report and the report prepared by Jabatan Penilaian dan Perkhidmatan Harta ('JPPH'), on 14 April 2016, the second respondent had assessed the amount of compensation due to the appellant in the sum of RM71.50 psm. Hence, cumulatively the compensation for Lot 1384 amounted to RM327,146.09; RM10,172,395.77 for Lot 1385; and RM22,388,472.03 for Lot 1887.

[7] The total compensation sum amounted to RM32,888,013.89. The said sum was deposited in court pursuant to s. 29 of the LAA on account of the appellant's refusal to accept the said compensation sum.

[8] Aggrieved by the said decision, on 23 May 2016, pursuant to s. 38(1) of the LAA, the appellant lodged Form N (application that objection be referred to court) with the Land Administrator, protesting over the sufficiency of the said compensation sum.

[9] Subsequently a notice of award and offer of compensation in Form H (pursuant to s. 16 of the LAA) was issued on 1 June 2016 and duly served on the appellant on 6 June 2016.

[10] In spite of the lodgement of the said Form N, on 4 July 2016 the appellant had also proceeded to file an *ex parte* application for judicial review *vide* lampiran 1 seeking to quash the said order made by the second respondent on 14 April 2016.

[11] Leave was granted to the appellant for the application for judicial review on 6 September 2016 *vide* lampiran 12, and the sealed order was only served on both the respondents on 11 November 2016.

[12] However, before service of the said sealed order, the appellant had on 13 September 2016 filed the "Notis Pendengaran Permohonan Bagi Semakan Kehakiman di bawah A. 53 k. 4, Kaedah-Kaedah Mahkamah 2012," seeking substantive relief, amongst others, an order of *certiorari* to quash "Pengambilan Tanah No. 70/2014 Pemberitahuan Warta Kerajaan No. GN: 255/17 April 2014 bagi hartanah-hartanah yang dikenali sebagai GM 486 Lot 1384, Geran 38712 Lot 1385 dan Geran 39320 Lot 1887, kesemua di dalam Mukim 11, Daerah Seberang Perai Selatan, Negeri Pulau Pinang milik perayu."

[13] On 24 February 2017, the respondents served a notice of preliminary objection upon the appellant, contending that the judicial review in essence, was in respect of the acquisition of the scheduled land by the first respondent under s. 8(1) of the LAA. It was argued by the respondents that Form E, notifying the appellant, as the landowner, of the said acquisition was served on the appellant on 26 November 2014. It was thus further argued that the application for judicial review to challenge the decision of the first respondent declaring the formal acquisition of the scheduled land, must be filed within three months from the service of Form E on the appellant on 26 November 2014, in conformity with O. 53 r. 3(6) of the ROC. Hence, the filing of the *ex parte* application for judicial review on 4 July 2016 was clearly in violation of the said O. 53 r. 3(6) and also not in tandem with the decision of the Federal Court in *Kijal Resort Sdn Bhd v. Pentadbir Tanah Kemaman & Anor* [2015] 3 CLJ 861.

[14] The learned JC was in full agreement with the contention of the respondents in sustaining the said preliminary objection and, amongst others, found, as evinced in his grounds of judgment at p. 71, para. 20, rekod rayuan tambahan (RRT), that:

> [20] Given the fact that the *ex parte* application in this case was only filed on 04.7.2016 (a lapse of almost 20 months later), the time frame of 3 months for the filing of judicial review has long been surpassed hence this judicial review should be dismissed *in limine* since the case of *Kijal Resort Sdn. Bhd.* is definitely on all fours with the Judicial Review before this Court.

[15] Hence, this appeal before us by the appellant/landowner.

The Appeal

[16] Learned counsel submitted that the learned JC erred when he excluded the application for judicial review and the order granting leave for the application for judicial review from consideration when seeking to ascertain the reliefs sought by the appellant, as seen in para. 2(a) to (f) of his grounds of judgment at p. 64, RRT.

[17] Learned counsel submitted that by the said *ex parte* judicial review application dated 4 July 2016 (lampiran 1 at p. 2, appellant's core bundle,), the appellant had sought leave for:

> Satu perintah *certiorari* bagi membatalkan Perintah Perbicaraan Pengambilan Tanah No. 70/2014 Pemberitahu Warta Kerajaan No. GN: 255/17 April 2014 bagi hartanah-hartanah yang dikenali sebagai GM 486 Lot 1384, Geran 38712 Lot 1385, Geran 39320 Lot 1887, kesemuanya dalam Mukim 11, Daerah Seberang Perai Selatan, Negeri Pulau Pinang milik pemohon.

[18] The said 'perintah perbicaraan pengambilan tanah' was in respect of the order made by the second respondent on 14 April 2016.

[19] Learned counsel thus submitted that since the application for judicial review was made on 4 July 2016, it was clearly within the three months period prescribed by O. 53 r. 3(6) of the ROC.

[20] It was further submitted that the reliefs sought in an application for judicial review is found in the application itself (that is as enumerated in paras. 10 and 11 above). However, the respondents and the learned JC erred when they looked elsewhere to find the reliefs sought by the appellant. Clearly, the appellant's application for judicial review was against the 'perintah perbicaraan pengambilan tanah' made by the second respondent on 14 April 2016, contended as void for failure to comply with the procedural and substantive requirement of the LAA and not against the land acquisition *per se* or the quantum of award as found by the learned JC.

[21] Additionally, it was argued by learned counsel that the order made by the second respondent was *ultra vires* s. 3(1)(a) of the LAA as the section only empowers the second respondent to acquire land for public purpose and not for industrial purpose as was the case here, which anyway must be made pursuant to s. 3(1)(c) and s. 3(3) of the Act. Since the acquisition was not made pursuant to these two sections, there were hence corresponding non-compliances of the provisions under ss. 3A, 3B, 3C, 3D, 3E and 3(5) of the LAA, rendering the said acquisition void. Further, there are specific provisions for land acquisition for industrial purpose (sub-s. 3(1)(c) and 3(3)), hence s. 3(1)(a) of the LAA cannot be utilised to acquire the appellant's land for the said industrial purpose.

[22] It was further submitted that s. 3E of the LAA clearly states that only the State Authority, which has been defined to mean the Ruler or the Yang diPertua Negeri of the State under the LAA, may approve the acquisition of land for industrial purpose. Therefore, the order made by the second respondent was *ultra vires* and void as the second respondent has no power to make such acquisition order for industrial purpose.

A

Our Decision

[23] From the outset, we would express our full agreement with the approach taken by the learned JC that the issue for determination must be pivoted upon whether the judicial review was in respect of the acquisition of the said scheduled land under s. 8(1) of the LAA where the same was gazetted on 17 April 2014 and where the notification in Form E of the said acquisition was duly served upon the appellant on 26 November 2014 or whether it was a judicial review in connection with the order/decision made by the second respondent upon conclusion of the enquiry on 14 April 2016.

[24] If it is the former, then it necessitates that the application for judicial review must be filed within three months from the service of Form E upon the appellant on 26 November 2014, where the decision was first communicated to the appellant, in conformity with O. 53 r. 3(6) of the ROC and further fortified by the Federal Court in its decision in *Kijal Resort Sdn. Bhd v. Pentadbir Tanah Daerah Kemaman & Anor (supra)*. (The time frame prescribed for the filing of judicial review has since been amended and enlarged from 40 days under O. 53 r. 3(6) of the Rules of the High Court 1980, then applicable in *Kijal Resort Sdn Bhd* case, to three months under O. 53 r. 3(6) of the Rules of Court 2012).

[25] However, if it is the latter, then time starts to run only from 14 April 2016, the date the second respondent handed down his order/decision upon conclusion of the aforesaid enquiry. Hence, if the application was filed on 4 July 2016, it was clearly well within the three month-period prescribed by O. 53 r. 3(6) of the ROC.

[26] Order 53 r. 3(6) of the ROC provides that:

> (6) An application for judicial review shall be made promptly and in any event within three months from the date when the grounds of application first arose or when the decision is first communicated to the applicant.

[27] It may well be true that prayer (a), one of the reliefs sought in the *ex parte* application for judicial review was for "(a) kebenaran diberi untuk memohon satu perintah *certiorari* bagi membatalkan Perintah Perbicaraan Pengambilan Tanah No. 70/2014" (see p. 2, appellant's core bundle).

[28] It is also true that the order granting leave pursuant to the said *ex parte* application states that "... Maka Adalah Diperintahkan bahawa kebenaran diberi untuk memohon satu perintah *certiorari* bagi membatalkan Perintah Perbicaraan Pengambilan Tanah No. 70/2014 ... " (see p. 20, appellant's core bundle).

[29] However, the prayers set out in para. 3(a), (b) and (c) in the statement pursuant to O. 53 r. 3(2) of the ROC, dated 4 July 2016 (see pp. 12 to 18 appellant's core bundle), supporting the appellant's application for judicial review and para. 3(ii)(a), (b) and (c) of the appellant's statement dated

9 September 2016 (see pp. 34 to 41, appellant's core bundle), supporting the appellant's "Notis Pendengaran Bagi Semakan Kehakiman" under O. 53 r. 4 dated 13 September 2016 (see pp. 22 to 24, appellant's core bundle), speak of something entirely different. The prayers in para. 3(a), (b) and (c) of the former and in para. 3(ii)(a), (b) and (c) of the latter are identical. It states:

> (a) Kebenaran diberi untuk memohon satu perintah *certiorari* bagi membatalkan Pengambilan Tanah No. 70/2014 Pemberitahu Warta Kerajaan No GN: 255/17 April 2014 bagi hartanah-hartanah yang dikenali sebagai GM 486 Lot 1384, Geran 38712 Lot 1385, Geran 39320 Lot 1887, kesemuanya di dalam Mukim 11, Daerah Perai Selatan, Negeri Pulau Pinang milik pemohon.
>
> (b) Kos dalam kausa.
>
> (c) Lain-lain perintah sesuai yang selanjutnya.

[30] It was very apparent that the said prayers as set out in paras. 3(a) and 3(ii)(a) above had nothing to do with the quashing of the perintah perbicaraan pengambilan tanah made by the second respondent on 14 April 2016. On the other hand, it was clear to us that the said prayers in paras. 3(a) and 3(ii)(a) were all about the quashing of the decision made by the State Authority to acquire the scheduled land *vide* the declaration in Form D which was published in the State Government *Gazette* on 17 April 2014 pursuant to s. 8(1) of the LAA. We found the said prayers in the said paragraphs profoundly inconsistent with prayer (a) of the *ex parte* application itself (see p. 2, appellant's core bundle). Indeed the appellant's argument that the judicial review was against the second respondent's decision on 14 April 2016 was contradicted by the appellant's own statement of facts and hence was untenable and neither is it defensible.

[31] Learned counsel contended that the aforesaid paras. 3(a) and 3(ii)(a) were merely a clerical error and the respondents had clearly taken advantage of the same by giving it a different spin altogether.

[32] We had scrutinised both the statements in their entirety, and in our view the said prayers could not have been a mere clerical error on account that the said statements were littered with averments in support of the prayers set out in paras. 3(a) and 3(ii)(a), and equally inconsistent with prayer (a) of the *ex parte* application, as shown in the paragraphs reproduced herein below:

> 6 ... Tujuan pengambilan tanah-tanah yang disenaraikan di dalam warta tersebut adalah dikatakan untuk Tujuan Awam di bawah perenggan 3(1)(a) Akta Pengambilan Tanah 1960 [Akta 486] iaitu pembangunan Industri. Warta tersebut jelas melanggar peruntukkan Akta 486 kerana kegunaan Industri adalah di luar Seksyen 3(1)(a) Akta 486. Tujuan penggunaan Awam tidak termasuk untuk maksud industri.
>
> 7 ...
>
> 8 ...

9. Responden-responden telah bertindak di luar kuasa mereka (*ultra vires*) apabila mengambil tanah-tanah tersebut untuk pembangunan industri di bawah Seksyen 3(1)(a) Akta 486. Di bawah Seksyen 3(1)(a) Akta 486, Responden-responden tidak ada kuasa mengambil tanah-tanah tersebut untuk maksud pembangunan industri.

10. Saya telah dinasihatkan oleh peguam saya bahawa Seksyen 3(1)(a) Akta 486 adalah untuk tujuan awam. Pengambilan tanah untuk tujuan pembangunan industri mestilah dibuat di bawah Seksyen 3(1)(c) Akta 486. Di bawah pengambilan tanah di bawah Seksyen 3(3) Akta 486, Responden Pertama hendaklah membuat permohonan pengambilan tanah secara bertulis kepada Responden Kedua. Permohonan tersebut hendaklah disertai dengan perkara-perkara berikut:

(a) Cadangan projek;

(b) Pelan susunan dan pelan pengambilan tanah;

(c) Laporan Nilaian awal daripada pihak Kerajaan untuk tanah yang dikehendaki dan

(d) Deposit dan fi yang telah ditetapkan oleh Akta tersebut.

11. Keperluan yang dinyatakan di bawah perenggan 10 di atas tidak dipatuhi oleh Responden Pertama.

12. Ketika perbicaraan di hadapan Responden Kedua pada 14 April 2016 peguam Pemohon telah meminta kesemua dokumen-dokumen yang disenaraikan di Seksyen 3(3) (a), (b), (c) dan (d) tetapi dimaklumkan bahawa tidak ada dokumen-dokumen tersebut dikemukakan kepada Responden Kedua kerana dikatakan pengambilan ini adalah di bawah Seksyen 3(1)(a).

13. Oleh itu saya mengatakan bahawa permohonan pengambilan tanah ini adalah tidak sah dan terbatal kerana:

13.1 Warta Pengambilan tanah-tanah tersebut adalah tidak sah dan terbatal kerana tidak mengikut peruntukan Akta 486.

13.2 Pengambilan tanah-tanah tersebut adalah di luar skop Seksyen 3(1)(a) dan tindakan Responden Pertama dan Responden Kedua adalah di luar kuasa mereka (*ultra vires* their powers).

13.3 Sekiranya permohonan pengambilan tanah-tanah tersebut adalah di bawah peruntukan Seksyen 3(1)(c) (yang tidak diwartakan sedemikian) permohonan pengambilan tanah-tanah tersebut tidak memenuhi keperluan-keperluan di bawah Seksyen 3(3) yang memerlukan dokumen-dokumen di Seksyen 3(3)(a), (b), (c) dan (d) dikemukakan kepada Responden Kedua dan Pemohon.

13.4 Pengambilan tanah-tanah tersebut adalah tidak sah dan terbatal kerana melanggar perkara 13 Perlembagaan Persekutuan.

[33] The rest of paras. 13.4 to 13.7 referred to the inadequacy of the compensation sum meted out by the second respondent, the error of the second respondent in treating the appellant's lands as estate land thereby assigning a lower value, the propensity and *mala fide* of the respondents in acquiring the lands and awarding low compensation to landowners but subsequently reselling the said lands to third parties at a much high price many times over, and the high degree of probability that the second respondent would act in a bias manner on account that the second respondent is a public officer whose salary was paid by the first respondent.

[34] Paragraph 14 of the statement relates to the appellant's financial and technical capacity to develop the scheduled land into an industrial hub with various kinds of development projects, without the need for the respondents to acquire the said land for the same purpose (industrial purpose).

[35] It was obvious that the thrust of the O. 53 r. 3(2) statement was directed towards the impropriety and illegality or otherwise of the acquisition of the scheduled land by the first respondent and not against the order/decision made by the second respondent, which in this case, was strictly limited only on the issue of the quantum of the compensation sum payable to the appellant and other matters incidental to it. It was very apparent that cumulatively, the said corresponding statements were consistent and supportive of the prayers encapsulated in paras. 3(a) and 3(ii)(a) of the said statements respectively.

[36] The appellant's affidavit in support of the notis pendengaran permohonan bagi semakan kehakiman affirmed on 9 September 2016 was crafted in identical terms (see pp. 25 to 32, appellant's core bundle). It wholly supported the granting of the prayers as set out in para. 3(a) and 3(ii)(a) of the statements under O. 53 r. 3(2) of the ROC. There was nothing in the affidavit suggesting satu perintah *certiorari* bagi membatalkan "Perintah Perbicaraan Pengambilan Tanah No. 70/2014".

[37] In our view, the decision to acquire the scheduled land was purely within the prerogative of the first respondent, being empowered to do so under s. 8(1) of the LAA, and who had then caused the publication of the declaration of the intended acquisition in Form D in *Warta* Kerajaan Negeri Pulau Pinang No. 255 dated 17 April 2014. The said acquisition was needed for a public purpose pursuant to s. 3(1)(a) of the LAA. The appellant was thus given the requisite notice of the said decision of the first respondent and the purpose upon which the land was acquired.

[38] The second respondent's role was only to execute the said decision by the first respondent. Thereafter under s. 12 of the LAA, the second respondent was to commence proceedings of an enquiry for the hearing of claims for compensation for all such interest in the scheduled land after the

requirements under s. 10 of the same had been complied with, *to wit*, the issuing and service of the Form E public notice to all those having interest in the said scheduled land.

[39] Upon conclusion of the enquiry under s. 12 of the LAA, the second respondent, pursuant to s. 14 of the same, shall prepare a written award in Form G and have it served upon the appellant or each person interested in such land *vide* notice in Form H as prescribed by s. 16 of the Act.

[40] In our view, the second respondent is devoid of any jurisdiction to make an acquisition order as claimed by learned counsel. His primary duty is mainly to determine the quantum of compensation that is payable to the person or persons interested in such land. In case the person or persons interested is dissatisfied with the said quantum, he or she is at liberty to file an objection *vide* Form N pursuant to s. 38 of the LAA. This course of action had been initiated by the appellant.

[41] In all the circumstances of the case, we ruled that the appellant's application was directed squarely to quash the decision of the first respondent in acquiring the scheduled land and not to quash the decision of the second respondent on the quantum of compensation due to the appellant made on 14 April 2016. Hence, in conformity with the requirement under O. 53 r. 3(6) of the ROC, the appellant must file his *ex parte* application for leave for judicial review to quash the said decision within three months from the service of Form E upon the appellant on 26 November 2014, where the decision of the first respondent declaring the formal acquisition of the scheduled land was first communicated to the appellant (see *Tunku Yaacub Holdings Sdn Bhd v. Pentadbir Tanah Kedah & Ors* [2015] 3 CLJ 1017, on the issue of service of Form E as the starting point to calculate when time starts to run for the purposes of O. 53 r. 3(6) of the ROC).

[42] Form E was served on the appellant on 26 November 2014. The *ex parte* application for leave for judicial review was only filed on 4 July 2016, slightly more than 19 months after service of Form E was effected upon the appellant. There was absolutely a delay beyond the three months' timeline as stipulated by O. 53 r. 3(6) and the said delay was wholly inordinate. There was also no application for extension of time to file the said application by the appellant, let alone the reasons for the delay in making the application.

[43] There was no doubt that the appellant was bound by the terms of O. 53 r. 3(6) of the ROC and by the said terms his application was verily out of time. Therefore the learned JC had no jurisdiction to hear the judicial review application by the appellant. In our view, the learned JC had correctly sustained the respondents' preliminary objection and his consequential order of dismissing the appellant's application *in limine*.

[44] This issue of delay was squarely put to rest by the Federal Court in its decision in *Kijal Resort Sdn. Bhd. v. Pentadbir Tanah Daerah Kemaman & Anor (supra)* where at pp. 894 and 894, Ramly Ali FCJ, speaking for the court pronounced:

> [116] We are of the view that an application for leave for judicial review made under O. 53 r. 3(6) of the RHC 1980 challenging the decision of the State Authority declaring that the land is to be acquired under the LAA, must be filed within 40 days from the date when the decision was first communicated to the applicant i.e., on the date when the notice of enquiry in Form E which appended a copy of the schedule to Form D was served pursuant to s. 10 of the LAA on the registered proprietor or occupier of the land pursuant to ss. 11, 53 and 54 of the LAA.
>
> [117] In the present case before us, Form E was served on the appellant on 7 March 2006. Application for leave for judicial review was filed on 6 January 2008 i.e., almost 22 months after Form E was served on the appellant; or in other words, 22 months after the decision to acquire the land in question was first communicated to the appellant. This is clearly a beyond the 40 days time frame as stipulated in O. 53 r. 3(6) of the RHC 1980. There had been inordinate delay on the part of the appellant in filing for judicial review. There is no indication to show that the appellant had applied for an extension of time.
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> ...
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> ...
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> ...
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> [123] Applying the same principle to the facts of the present case, we are of the view that the High Court had no jurisdiction to hear the appellant's application for judicial review on the ground that the time frame of 40 days under O. 53 r. 3(6) of the RHC 1980 has not been complied with. On this ground alone, we are in agreement with the Court of Appeal that the respondent's first objection must be upheld and the judicial review application by the appellant ought to be dismissed *in limine*; and consequently, the appellant's appeal before us must also be dismissed.
>
> [124] In view of the above findings, there is no necessity for this court to consider the second objection that the proper party was not named as the first respondent. There is also no necessity to go into the merit of the judicial review application. As has been clearly said by Hashim Yeop Sani FJ in *Ravindran P. Muthukrishnan v. Malaysia Examination Council* [1984] 1 CLJ 232; [1984] 1 CLJ (Rep) 320; [1984] 1 MLJ 168: 'Since the judge rejected the explanation for the delay it follows that the court had no-jurisdiction to hear the application for leave for an order of *certiorari* ... whether the application for an order of *certiorari* had merits or not was irrelevant'.

[45] There can be no doubt that the appellant's narrative fell squarely within the four walls of the above-said ruling. Consequently, there was no necessity to go into the merits of the judicial review application.

[46] In addition, this court in *Jitender Singh Pagar Singh & Ors v. Pentadbir Tanah Wilayah Persekutuan & Another Appeal* [2012] 2 CLJ 165, after having alluded to the 40 days' time frame stipulated by O. 53 r. 3(6) of the Rules of the High Court 1980, pronounced, at para. 16, p. 173, that:

> Compliance with the time frame prescribed by the Rules is fundamental as it goes to jurisdiction (see *Mersing Omnibus Co. Sdn. Bhd. v. The Minister Of Labour & Manpower & Anor* [1983] 2 CLJ 7; [1983] CLJ (Rep) 266). On this ground alone the application for judicial review could and should have been dismissed by the High Court judge hearing the judicial review application.

[47] The pronouncement of the Federal Court in *Wong Kin Hoong & Anor v. Ketua Pengarah Jabatan Alam Sekitar & Anor* [2013] 4 CLJ 193; [2013] 4 MLJ 161, 171, at para. 30 was conspicuously in similar vein:

> In conclusion, we are of the view that the time frame in applying for judicial review prescribed by the Rules is fundamental. It goes into jurisdiction and once the trial judge had rejected the explanation for the delay for extension of time to apply for judicial review, it follows that the court no longer has the jurisdiction to hear the application for leave for judicial review. Whether the application has merits or not, is irrelevant.

[48] Further, under O. 53 r. 3(2), an application for leave for judicial review must be made *ex parte* and must be supported by a statement setting out the name and description of the applicant, the relief sought and the grounds in which it is sought and by affidavits verifying the facts relied on. This order is mandatory. It further emphasises the principle that a party is bound by his own pleading and this rule is also mandatory in nature. In this case, the inconsistencies in respect of the appellant's prayer as pleaded in the *ex parte* application and the prayers as pleaded in the appellant's statement (under O. 53 r. 3(2)) and the subsequent averment of facts were poles apart. We opined further that the prayers pleaded in the *ex parte* application and the submissions advanced by learned counsel in respect of the same were beyond the scope of the appellant's pleaded case as encapsulated in the statement and the appellant's affidavits in support thereof. These two grounds would constitute sufficient reasons for us to find that the appeal had no merits. Thus, we found no error in the learned JC's decision in dismissing the appellant's application *in limine*. Therefore, the appeal was dismissed.

[49] We also found support in the Court of Appeal case in *V Paul Raj Chelladurai v. Jabatan Telekom Malaysia Bhd & Ors* [2000] 4 CLJ 882, where the facts as per its headnotes read as follows:

> The appellant was dismissed after the institution of a disciplinary proceedings against him. The appellant later challenged the propriety of the disciplinary proceedings by filing in the High Court, a motion for *certiorari* to quash the decision. The High Court dismissed the motion. The appellant then appealed to the Court of Appeal by way of judicial review on the ground that there had been procedural unfairness in the conduct of the proceedings. He contended that he was not informed of the nature

of the extraneous matters that the disciplinary board had taken into account when considering the charge against him and that he was not given the opportunity to plead in mitigation before the dismissal was decided against him. These objections, however were not set out in the statement supporting his application for *certiorari*.

Siti Normah Yaakob JCA, speaking for the court, at p. 887, held that:

Clearly from the aforesaid grounds, the appellant never raised as issues his objections to the use of the phraseology 'dan Iain-lain maklumat yang berkaitan' and the loss of the opportunity to plead in mitigation. These two objections were only raised for the first time before us as in the court below the appellant was more content to submit on other issues. Order 53 r. 3(1) of the RHC emphasises the principle that a party is bound by his own pleadings and since that order the rule is mandatory in nature, the omission to plead in the statement the two objections raised before us is sufficient reason for us to hold that this appeal lack merits and on that conclusion we dismiss it with costs, confirm the order of the High Court and order that the deposit be paid out to the respondents to account of their taxed costs.

[50] Additionally, it was held by the Supreme Court in *Tuan Haji Sarip Hamid & Anor v. Patco Malaysia Sdn Bhd* [1995] 3 CLJ 627 that:

[1] Any application under O. 53 r. 1(2) [now O. 53 r. 3(2)] must be drafted in such a way as to ensure that it contains all or substantial particulars of the facts and matters on which the applicant intends to rely in support of his application. The affidavit in support thereof must also be sufficiently detailed and comprehensive and must exhibit all the relevant documentary exhibits ... .

[51] We were satisfied that the appellant's statements and affidavits in support thereof fell short of the requirements as mandated by O. 53 r. 3(2). Both could not have supported the appellant's application for judicial review.

[52] Next, learned counsel complained that the learned JC had ignored his preliminary objection over the preliminary objection canvassed by the respondents, in particular on the following matters:

(i) that the issue that the appellant had exceeded the prescribed time frame to file the judicial review cannot be raised by way of a preliminary objection but must be done through a formal application pursuant to O. 42 r. 13 of the ROC;

(ii) the preliminary objection was equally filed out of time since leave had been obtained from the court for the judicial review;

(iii) the issues raised in the preliminary objection could not be raised at this stage as it was never raised in the respondents' affidavits; and

(iv) the issue of the appellant's delay in filing the judicial review could not now be challenged as there was no challenge by the Attorney General at the leave stage where the papers were properly served upon them by the appellant.

[53] We took note that the same issues were canvassed before the learned JC. Nevertheless, we were of the view that the said issues were trite and had been resolved by numerous case laws. We were further of the view that the said issues had been correctly dealt with and disposed of by the learned JC as indicated in paras. 22 to 28 (at pp. 72 to 75, RRT) of his grounds of judgment. We were in full agreement with his findings and had nothing more of significance to add to them.

Conclusion

[54] For all the reasons enumerated above, we dismissed the appellant's appeal with cost fixed at RM10,000. We also ordered that the deposit for the appeal be refunded to the appellant.